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**TO THE ISSUE OF DETERMINING THE
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TO THE ISSUE OF DETERMINING THE CRITERIA FOR DIFFERENTIATING HUMAN RIGHTS INTO ABSOLUTE AND RELATIVE

Serhiy MELENKO¹, Dan PARANYUK²

Abstract

Based on logical-gnoseological and axiological analyses, the article under studies presents an attempt of ontological research regarding the division of a wide range of human rights into absolute and relative ones. This article is a continuation of the authors' investigation [9] on scientifically substantiating the problem of determining some features that make it possible to find out, which group (absolute or relative) a certain human right belongs to, according to the European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950 (further – the Convention) [5]. The right to life and the right to absolute inviolability of the individual have been selected as the principal samples of this research. Taking into consideration the essence of certain cases, considered by the Strasbourg Court, as well as some other normative-legal acts, the authors of the article under discussion offer a few identification “markers”, which should lay the foundation of differentiating human rights. In addition, they question the present-day indisputable division of human rights into absolute and relative. Consequently, this article is of a rather debatable nature, since it aims at clarifying certain phenomena and notions in the field of the issue under investigation.

Keywords:

Human rights; absolute and relative rights; the right to life; prohibition of tortures.

I. MAIN PARAGRAPH

The authors, in the previous article, have already discussed the issues that are directly or indirectly associated with the division of human rights into absolute and relative [9]. Particular emphasis has been laid on the problem of general acceptability of splitting all human rights (singled out in

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the Convention and its Protocols [5]), according to their probable legitimate restriction, into two quite independent groups – absolute and relative. In this paper, the authors make another attempt to give a gnoseological definition of the ontological-axiological “markers” that enable to carry out the above differentiation. The comparative analysis has been conducted on the basis of Articles 2 (which ensures the right to life [5]) and 3 (which prohibits any tortures on the part of the state, in any existing forms [5]) of the Convention. This comparative analysis has also been carried out with due consideration of both theoretical basics of the Convention [5] and its Protocols, and the materials of juridical practice, like certain decisions of the European Court of Human Rights (ECHR), made in cases regarding the right to life and prohibition of tortures.

It is universally recognized that life is the most significant legal benefit of every individual. According to N. Matuzov, the right to life is a fundamental natural right of a human being. All other rights, undoubtedly, make no sense without it [8]. It is worth mentioning that the right to life and its protection have been normatively secured only after World War II, due to the adoption of The Universal Declaration of Human Rights (UDHR) in 1948 [14]. For instance, Article 3 of the Declaration states that every human has the right to life, to freedom and to personal inviolability. The above statement sounds somewhat ambiguous; this is why the European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950 [5] contains a far more specified definition. It would be also expedient to point at the fact that the axiological essence of the right to life was specified two more times (in Protocol 6 of the Convention from April 28, 1983 and in Protocol 13 of the Convention from May 3, 2002 [5]) after the Convention was adopted. This has led, eventually, to the abolishment of death penalty by all the states-members of the Council of Europe. At the same time, Paragraph 2 of Article 3 of the Convention contains distinct normative-regulatory cases, whereby the state receives the power to violate the right to life (which attributes the latter right to the category of relative rights):

- a) defending any person from unlawful violence;
- b) effecting a legal arrest or preventing the escape of lawfully detained individual;
- c) quelling a riot or insurrection.

However, it should be borne in mind that in every case, whereby an individual will be deprived of his/her life, there has to be an absolutely necessary condition of state’s applying force. The latter should be legitimate and conform to its objectives. It should also take into account the danger to life that arises in every particular situation and different sorts of risks,

directly related to the very fact of violence, which, in its turn, may cause the individual's loss of life. This observation derives from the axiological essence of the case "Stewart vs. the United Kingdom", which (in compliance with Article 2 of the Convention) emphasizes the prohibition of excessive force by the state, as it may lead to life deprivation despite the degree of intentionality of such application [11]. Besides, according to this very Article 2 of the Convention, protection of the right to life is closely associated with the state's duty to ensure rights and freedoms (singled out in the Convention) to everyone under its jurisdiction, as well as indirectly requires any form of efficient investigation in case an individual was murdered due to applying force [7].

Thus, we might conclude that apart from its duty to ensure the rights of the citizens, who fall under its jurisdiction, the state is also provided with the opportunity to violate the right to life in certain distinctly determined and normatively regulated cases [10]. To put it differently, in spite of the prohibition to apply the death penalty, the state possesses all the necessary authorities and mechanisms to deprive an individual of his/her life. Isn't it too contradictive and ambiguous? Article 3 of the Constitution of Ukraine claims that the human being, his or her life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value [12]. In other words, taking into account Paragraph 2 of Article 2 of the Convention, the highest social value, envisaged by the Constitution of Ukraine, may be ignored and neglected because the state (though only in very restricted circumstances) has the right to deprive its citizens of their lives. Moreover, Article 27 of the Constitution of Ukraine directly points at the fact that every human being, despite his race, beliefs, ethnic and social origin, etc., has an indispensable right to life [12]. The above imperative looks somewhat "blurred" due to the notion of "arbitrariness", since Paragraph 1 of Article 27 of the Constitution of Ukraine says that no one can be deprived of life, the duty of the state being to protect human life. Taking into consideration the essence of the notions under analysis, we might undoubtedly conclude that the right to life is indispensable. Article 21 of the Constitution of Ukraine says that human rights and freedoms are inalienable and inviolable, the right to life among them. At the same time, Article 23 of the Constitution points out that constitutional rights and freedoms are guaranteed by the state and shall not be cancelled. Hence, there arises a relevant question: doesn't the violation of the right to life, which is allowed by Paragraph 2 of Article 2 of the Convention, contradict to the Constitution of Ukraine? Or does the content of the Constitution of Ukraine conform to the Convention? In addition, in compliance with the decision of the Constitutional Court of Ukraine from December 29, 1999

№11-пII/1999 [4], the indispensable right to life of every individual is inextricably related to his/her right to dignity. As most fundamental human rights, they stipulate implementation of all other human rights and freedoms and can be neither restricted nor cancelled. Likewise, the above normative-regulatory acts directly indicate the inviolability of the right to life. Besides, neither Article 2 of the Convention, nor further decisions of the ECHR contain a definition of the notion “the right to life”. They neither articulate nor specify the notions “everyone” (who has this right) and “life” (what is meant by this term) [3: 245]. Therefore, we are pointing to some normative paradox, which does not presuppose the existence of the notion of “life”, but allows the possibility of violating the “right to life”.

On the other hand, Article 3 of the Convention says that no one shall be subject to tortures, as well as to inhuman or degrading treatment or punishment. In addition, Article 5 of the Declaration (1948) emphasizes that no one shall suffer from tortures, cruel, inhuman or degrading treatment or punishment [14].

It is important that Article 3 of the Convention protects one of the most fundamental values of any democratic society. It is very interesting from the gnoseological point of view to have a look at how the issue under studies is interpreted in the text of the case *Aksoy v. Turkey* [2], considered by the ECHR. It ascertains that even despite the most aggravating circumstances that accompany organized terrorism and organized crime, the Convention strictly prohibits tortures and inhuman or humiliating treatment or liability. Unlike most basic principles of the Convention and its Protocols №1 та №4, Article 3 has no exceptions. Moreover, Article 15 of the Convention does not allow any deviations from these requirements, even in the instance of social danger that threatens the entire nation.

We believe that Article 3 of the Convention contains a peculiar gradation of unlawful actions according to the degree of their severity. Nevertheless, each of the above actions shall not be committed in any circumstances, which makes it possible to refer the prohibition of tortures, inhuman or humiliating treatment or liability to the category of absolute human rights. We are certain that the hardest form of the above-mentioned actions is tortures. Our certainty rests on the fact that inhuman or humiliating treatment or liability may be regarded as a part of it. To be more specific, the term “tortures” has its own discretion. Apart from this, the Court has given a partial definition of the notion [1], which one may find in Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment from December 10, 1984 [13]. The above article gives a distinct definition of tortures. This is why, due to the lack of space in this article, we will focus our attention on a comparative

description of the right to life and the right to prohibition of tortures. The former legal category has already been substantiated (though rather fragmentary). As to the problem of determining the essence of tortures (as a peculiar form of affecting an individual on the part of the bodies of state power and various authorized persons), the ECHR, considering the violation of Article 3 of the Convention, relies on the doctrinal approach regarding the minimum level of cruelty [6]. In other words, the minimum level of cruelty is the lowest “borderline”, which helps identify the humiliation of dignity as the slightest violation of human rights that is ensured by Article 3 of the Convention. In fact, we are mostly concerned with other indicators of cruelty, which may be classified as tortures, for the violation of the right to life, even if it is normatively regulated, is usually associated with the actions that belong to the field of tortures.

Returning to the content of Paragraph 2 of Article 2 of the Convention, it is essential to point out that the state is normatively authorized to violate the right to life in the following instances:

- a) in case of protecting any person from illegal violence;
- b) in case of effecting a legal arrest or to prevent the escape of a lawfully detained individual;
- c) in case of taking any lawful actions to quell a riot or insurrection [5].

The Convention provides for cases, whereby the state is delegated some normative powers to violate the right to life. However, there is no specific description of how it can deprive an individual of his/her life. We suppose that in this particular case, the Convention drafters tried to “avoid” a rather significant problem: a human being may be deprived of live by means of applying various methods that are very likely to be admitted by the Court as permissible. Consequently, the state will bear no punishment. On the other hand, in Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment from December 10, 1984 [13], provides a broad definition of the term “torture”. That is, any intentional action falls under this definition. It is essential that in all three cases, envisaged by Paragraph 2 of Article 2 of the Convention, the actions aimed at depriving an individual of his/her life are intentional. In other words, both the actions that may be qualified as tortures and the actions that are committed by the state to deprive an individual of his/her life are of intentional character. At this very stage, their purposes completely coincide. In compliance with Article 1 of the above mentioned Convention [13], the actions, which may be classified as torture, *inflict severe pain or suffering*. Therefore, we may claim that any actions against the individual (within Paragraph 2 of Article 2 of the Convention) also inflict severe pain on a human, since they are not planned and mostly spontaneous. Besides,

they do not provide for the application of any medical painkillers that would relieve individual's sufferings, and it is impossible to cause painless death in any other ways. Hence, we may dwell on the similarity of one more feature, inherent to the actions that may be qualified as both tortures and deprivation of life. This feature is the purpose. In accordance with Article 1 of the above-mentioned UN Convention, *the purpose of tortures is ... to punish an individual for the unlawful actions he/she has committed...* Along with intentionality and inflicting physical pain, purpose of punishment is another distinct feature. Getting back to Paragraph 2 of Article 2 of the Convention, we would like to emphasize the fact that in case of defending anyone from illegal or unsanctioned violence, in case of effecting a lawful arrest or preventing the escape of a lawfully detained individual and in case of lawful quelling a riot or insurrection [5], the person may be deprived of life only provided that he/she has committed some active, unlawful actions. Here, we may once again trace up the factor of coincidence of the third feature, which can be viewed as an identifying "marker" of classifying a certain action as both tortures and deprivation of life.

Let us list the "markers of coincidence" (that are inherent to the actions that fall under the classification of both tortures and deprivation of life) once again:

1. An intentional nature of the action;
2. Inflicting physical pain when applied;
3. Purpose – to punish an individual for the unlawful actions he/she has committed.

It is obvious that all three qualification features of both tortures and deprivation of life completely coincide. So, what is the difference between them? We believe the difference lies in the consequences of these actions. To be more specific, in case of tortures, an individual mostly preserves his life, whereas in the second case under consideration, he loses his life. In addition, it is very essential to take into account the factor of legitimacy. Tortures are always illegal, while deprivation of life (regarding certain cases in accordance with Paragraph 2 of Article 2 of the Convention) acquires a normative status, although the authors of the article question the latter. They also lay particular emphasis on the fact that even normatively regulated deprivation of life causes a wide range of sufferings, characteristic for tortures. Therefore, it would be expedient to assume that the Convention, granting the state the right to deprive a person of his/her life, indirectly but lawfully allows tortures, although they are completely prohibited in Article 3. What is more, after lawfully depriving an individual of his/her life (in compliance with Paragraph 2 of Article 2 of the Convention) no attention is drawn to the fact that the individual may stay alive and go through all the

sufferings, peculiar for tortures. Here arises a question – can the state officially classify the above actions as tortures? The thing is that such actions will be of intentional nature, they will cause physical pain and might possibly be perceived as punishment for the committed actions. While analyzing the juridical experience of the ECHR, we were not able to find any answers. Therefore, we assume that the issue under discussion still lies within a theoretical discourse. Hence, we invite all our colleagues to take part in the discussion. Hopefully, in this way, we will manage to come up with the solution of this very crucial problem both in the fields of theoretical search and practical protection of human rights.

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